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**IN THE UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

<b>UNITED STATES OF AMERICA,</b>	) <b>Case No.: CR09-0712-02-PHX-DGC</b>
	)
<b>Plaintiff,</b>	) <b>DEFENDANTS' JOINT MOTION TO</b>
	) <b>DISMISS FOR VIOLATION OF BRADY</b>
<b>vs.</b>	) <b>V. MARYLAND AND FOR</b>
	) <b>PROSECUTORIAL MISCONDUCT,</b>
<b>DANIEL MAHON,</b>	) <b>OR IN THE ALTERNATIVE, TO</b>
	) <b>PRECLUDE TESTIMONY BY ALAN</b>
<b>Defendant.</b>	) <b>SCOTT</b>
	) <b>(Assigned to The Honorable David G.</b>
	) <b>Campbell)</b>
	<b>EVIDENTIARY HEARING REQUESTED</b>

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Defendants Daniel Mahon and Dennis Mahon, by and through undersigned counsel, hereby moves for a dismissal of all charges based on the government's misconduct in withholding material and exculpatory evidence in violation of the Fifth and Sixth Amendments of the Constitution, and Brady v. Maryland, 373 U.S. 83 (1963).

Brady requires the timely disclosure of evidence that is material either to the guilt or punishment of the defendant(s). Id. at 87. Evidence that will "play a role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal" must be provided by the government. United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993; United

1 States v. Bagley, 473 U.S. 667 (1985). “Taken together, this group of  
2 constitutional privileges delivers exculpatory evidence into the hand of the  
3 accused, thereby protecting the innocent from erroneous conviction and ensuring  
4 the integrity of the criminal justice system.” California v. Trombetta, 467 U.S.  
5 479, 485 (1984). Failure to disclose this evidence violates the precepts of Brady,  
6 supra, and Kyles v. Whitney, 514 U.S. 419, 437-438 (1995). Moreover, “an  
7 individual prosecutor has a duty to learn of any favorable evidence known to the  
8 others acting on the government’s behalf in the case, including the police.” Id.

9 Here, the prosecutors and the case agent, together, knowingly withheld  
10 favorable evidence. Put another way, they knowingly and intentionally withheld  
11 exculpatory evidence, as defined by Brady, in violation of the defendants’  
12 constitutional rights. This violation was neither negligent nor accidental, as clearly  
13 shown by the facts as they have revealed themselves, and in light of the evolution  
14 of this case over the course of 2-1/2 years, the court should respond in an  
15 immediate and harsh manner.

#### 16 Relevant Background

17 Defendants incorporate herein in its entirety the relevant background set  
18 forth in Defendant Daniel Mahon’s Motion to Dismiss [Dct. #1336] pages two  
19 through page 5, line 13.

20 Attached hereto as Exhibit One is the December 2, 2010 letter from the  
21 government providing a disc of disclosures from Postal batestamped “USPS Supp  
22 1-447 excluding 40-42, 47-60.” Attached as Exhibit Two is a copy of USPS Supp.  
23 43, an email from November 8 2010 disclosed on that disc. Attached as Exhibit  
24 Three is a copy of Dct. No. 1344, later withdrawn, the government’s Response to  
25 Motion to Dismiss.

This Court ordered that the government disclose Jencks material on or  
before December 2, 2011. What the government disclosed on that date is attached

1 hereto as Exhibit Four. Defendants respectfully underscore that the Jencks  
2 material provided does not include the criminal history of Alan Scott, an inmate  
3 when interviewed in 2009. After receiving what they believed to be “full” Jencks  
4 disclosure, as ordered by this Court, on December 7, 2011, the defense requested  
5 the transcript of the Alan Scott plea colloquy under Brady. That email is attached  
6 as Exhibit Five. The government agreed to provide the transcript, but it has not yet  
7 arrived. Also, on December 8, 2011 the defense requested the report and notes of  
8 Inspector Donnelly reference his interview of Alan Scott. That email is attached as  
9 Exhibit Six. The government did not respond to that request.

10 On December 14, upon receipt of the government’s first Response, Dct.  
11 #1344, the defense requested copies of all documents listed in that pleading. In  
12 response, the government sent what is attached hereto as Exhibit Seven.

13 Defense Request No. 2 from the June 29, 2010 Matrix [Dct. No. 523]  
14 requests ATF ROI #308. ROI #308 is included in Exhibit Four. The defense now  
15 knows that this ROI covers the interview of Alan Scott. The defense request was  
16 based on both Brady v. Maryland and Rule 16(a)(1)(A) and (B). The government  
17 refused to disclose, stating “Rule 16(a)(1)(b) is inapplicable because it concerns  
18 written/recorded statements. #308 contains an oral statement of Dennis Mahon,  
19 not made in response to government interrogation. Is not Brady because it is not  
20 exculpatory.”

21 At the hearing held September 2, 2010, the government responded to  
22 Request No. 2 by stating, “I can tell you that if there was a question on the  
23 government’s mind we would err on the side of caution and give you a copy of the  
24 report. We have one with us if you want to review it. This is not even a close call  
25 for the government and the person was not a government agent.” Transcript of  
September 2, 2010, page 12. The Court stated, “Why don’t you provide me with a  
copy of the statement. I’m going to look at the case again. If I can rule without

1 reviewing it, I will. If I need to review it, I will.” Transcript of September 2,  
2 2010, page 13. The defense does not know if the Court reviewed the report or  
3 even which report was presented. However, the reports the defense has now  
4 received DO NOT comport with the notes of the interview on numerous key  
5 points.

6 As a point of fact, the ROI #308 authored by Tristan Moreland does not  
7 include the Brady material contained within the handwritten notes within Exhibit  
8 Seven, an interview attended by Agent Moreland. If ROI #308 was the report  
9 provided to the Court on September 2, 2010, that is relevant to the defense position  
10 that the report is designed to deceive.

11 These disclosures have been made only weeks prior to trial, and the defense  
12 now knows that the Alan Scott interview and related documents relating are  
13 obvious Brady material.

14 First, ROI #308, dated September 3, 2009 and authored by Tristan  
15 Moreland, at page 2, paragraph 9, Agent Moreland wrote that “Mahon told Scott  
16 that the bomb was *sent* to the Diversity Office.” On page 4, paragraph 23, states  
17 that Dennis Mahon claimed to have “*sent* the bomb from Litchfield or Litchfield  
18 Park.” Also, in Inspector Felton’s draft, Scott supposedly said that Dennis Mahon  
19 said he “sent the bomb.” [Batestamp USPSsupp-000048.] However, in the  
20 handwritten notes not disclosed until December 14, 2011, it is clear that Alan Scott  
21 told Agent Moreland and Inspector Felton something entirely different. In fact, the  
22 actual statements are that Dennis Mahon “mailed the bomb,” “Mailed bomb from  
23 Litchfield or Litchfield Park,” and “DM told me ‘he mailed it,’” [USPSsupp-  
24 000054]. As this Court knows, the package found in the Scottsdale Library was  
25 never mailed. This information is exculpatory Brady material that should have  
been disclosed at least in response to the June 2010 matrix.

1 Also missing from the ROI #308 and the draft from Inspector Felton are the  
2 exculpatory statements about Daniel Mahon.

3 Both ROI #308 and the draft by Felton indicated that “Dennis told him he  
4 felt bad about involving his brother (in the bombing case) that he felt like he  
5 dragged Daniel into it.” However, the notes indicate Mr. Scott said something  
6 quite different. The notes state, “Bro[ther’s] only involvement is that he was in  
7 room w/CI who wanted to make bomb,” [Batestamp USPSsupp-000054] and “said  
8 his bro was only in room w/CI when they talked about harming the X husband –  
9 like he dragged his brother into it. Sounded like his brother (illegible, awaiting  
10 clear copies from government) . . . really involved but only his source of financial  
11 support.” [Batestamp USPSsupp-000057.] He was clearly not talking about “the  
12 bombing case,” but rather he was talking about the child molester ruse. The  
13 reports, therefore, not only misrepresent the statement, they purposefully delete the  
14 clear Brady material provided by Scott.

15 Additional exculpatory evidence in the Scott reports include that Dennis  
16 Mahon said he made the bomb from “fertilizer mixed w/other things,” and that “he  
17 was able to construct bomb from normal everyday things he got from farm.”  
18 [Batestamp USPSsupp-000054.] Also, the ROI and Felton draft do not include  
19 statements included in the notes that Dennis Mahon was having arguments and  
20 conflicts with Metzger, that Metzger distanced himself from Dennis Mahon, and  
21 that Metzger was angry that Dennis Mahon drew attention to himself. [USPSsupp-  
22 000047 and 51.]

23 The defendants asked for these reports many times. On the last possible  
24 date, when Jencks disclosure was ordered to occur, that disclosure was grossly  
25 incomplete. Only when the defendants saw Dct 1344 did they learn of the missing  
documents. And only when those documents arrived did the defendants realize the

1 obvious Brady nature of the information. The Brady implications should have  
2 been unmistakably obvious to the government.

3 For the reasons stated, Defendants move for a dismissal of all charges with  
4 prejudice. At the very least, Alan Scott should be precluded as a trial witness.

5 The government's misconduct also supports Daniel Mahon's motion for a  
6 severance. This newly disclosed evidence shows that these cases were improperly  
7 joined. The newly disclosed evidence shows that, in separate trials, Dennis Mahon  
8 could be called to testify on behalf of Daniel Mahon and could provide the  
9 exculpatory testimony outlined above.

10 RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of December, 2011.

11 \_\_\_\_\_/s/ Barbara L. Hull\_\_\_\_\_  
12 Barbara L. Hull, Attorney for Daniel Mahon

13 Original filed electronically this date.

14  
15 Courtesy copy of the foregoing sent  
16 electronically this date to:

17 The Honorable David G. Campbell  
18 United States District Court  
19 401 West Washington Street  
20 Phoenix, Arizona 85003  
21 at: [Campbell\\_chambers@azd.uscourts.gov](mailto:Campbell_chambers@azd.uscourts.gov)

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\_\_\_\_/s/ Barbara L. Hull\_\_\_\_\_